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Article 8

# Landlord-Tenant - Abandonment of Lease - Re-Entry and Occupation by Landlord

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but that same amount did not constitute a gift. The Court took notice of the problem of integration but indicated that it was contrary to the intention of Congress. In *Prouty v. Commissioner*[8] it was said, "The gift tax does not need to be so closely integrated with the income tax that decisions like the *Clifford* case extending the application of section 22(a) to the grantor of a trust must necessarily be read as holding that no gift tax was payable upon the creation of the trust." This case upon which the Court in the instant case placed great reliance has no bearing on the problem whether the trust earnings arising annually constitute a taxable gift from the grantor. There is no doubt that the grantor in the instant case made a taxable gift of the corpus. In *Lockhard v. Commissioner*[9] where the issue was squarely presented, the Court rejected the Commissioner's contention saying, "This suggested mode of treatment may be appropriate and reasonable; the only trouble with it is that it is not sanctioned by the statutory scheme." Why the courts here refuse to do judicially what Congress has not done is not clear. The concept of tax ownership and the transfer of ownership, for the most part, has not been a legislative creation . The answer may be that the courts will respond more readily in dealing with tax avoidance problems than they will where the question is one of adding gratuitously to the Commissioner's sources of revenue.

RAY ECKSTEIN

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**Landlord-Tenant—Abandonment of Lease—Re-entry and Occupancy by Landlord**—Plaintiff leased a Northern Wisconsin cabin to the defendant for a period of one year from July 15, 1947 at $37.00 per month. Defendant paid two months rent in advance, and occupied the premises on the agreed date. On September 15, 1947, defendant, without just cause, quit the premises and thereafter ceased to pay rent. The plaintiff, upon learning of the defendant's intention to quit the premises, told him that she "would sue him", and two days after the breach she brought this action, relying on the doctrine of the Wiensklar case.[1] Shortly after the abandonment, plaintiff entered and relet the premises until October 23, 1947. Thereafter the plaintiff's husband occupied the premises, the plaintiff joining him on weekends. The lower court affirmed the jury award of $150.00 to the plaintiff. *Held:* Judg-

[8] 115 F.(2d) 331 (C.C.A. 1st, 1940).
[9] 166 F.(2d) 409 (C.C.A. 1st, 1948).
[1] Weinsklar Realty Co. v. Dooley et al., 200 Wis. 412 at 415, 228 N.W. 515 (1930), where the landlord relet the abandoned premises and brought an action for breach of lease three months after the breach. The court held: "that act [bringing the action] clearly evidenced an election on part of the landlord to hold the tenant liable on the covenant of the lease and clearly established the fact the landlord took possession for the purpose of reletting the premises in order to mitigate damages he sustained through the tenant's breach of lease."

ment reversed, and cause remanded with directions to dismiss the complaint. Where a landlord moves in and occupies the premises for his own benefit, he accepts the surrender. It makes little difference under the facts whether this be treated as an acceptance of the surrender, or a complete mitigation of damages. *Richter v. Fassett, 253 Wis. 101 (1948).*

In an earlier case,[2] the Wisconsin Supreme Court held that where the landlord, after receiving an offer to surrender the premises, made no answer, but upon abandonment by the tenant drew upon the leased premises with a large quantity of dirt and filled up the leased premises to a depth of one to two feet, the *jury* was allowed to find that the landlord accepted the surrender under the theory that the landlord had made full and beneficial use of the land. The case is distinguishable from the principal case since the landlord did not give the tenant notice, and he used the land in a manner which would have impaired the tenant's use of the land. Also the jury found that the landlord made full and beneficial use of the land.

As Wisconsin holds that a lease is not only a conveyance of an estate but is also a contract,[3] it is difficult to find a justifiable theory to support the doctrine promulgated in the instant case. It is universally held that a tenant cannot terminate his lease unless the landlord consents.[4] While the termination need not be by express agreement, but may be made by acts of the parties which manifest an intent on the part of the tenant to surrender the premises, and an intent on the part of the landlord to accept the surrender,[5] such acts must *unequivocally* evidence an intent to accept the surrender.[6] The intention with which the landlord re-enters the abandoned premises is a question of fact to be determined by the triers of fact.[7] To hold that, as a matter of law, where the landlord re-enters and occupies the premises for his own benefit, he accepts the surrender, is to ignore the theory of intentional acceptance. This is especially true where all of his other acts indicate a contrary intention. Such a doctrine must presuppose that the landlord by such occupancy, suffers no damages from the wrongful breach of the tenant. To hold this supposition true in all cases is to ignore reality.

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[2] Kneeland v. Schmidt, 78 Wis. 345, 47 N.W. 438, 11 L.R.A. 498 (1890).
[3] Lincoln Fireproof Warehouse Co. v. Greusel, 199 Wis. 428, 224 N.W. 98 (1929).
[4] Carlton Chambers Co. v. Trask, 261 Mass. 264, 158 N.E. 786 (1927), and cases cited therein; Elmor Realty Co. v. Community Theatres, 208 Wis. 76, 241 N.W. 632 (1932).
[5] Eastern Offices v. P. F. O'Keefe Advertising Agency, 289 Mass. 23, 193 N.E. 837 (1935).
[6] Weinsklar Realty Co. v. Dooley et al., note 1, *supra.*
[7] Malone Co. v. Acquistapace, 73 Cal. App. 199, 238 Pac. 734 (1925); McGrath v. Schallett, 144 Conn. 622, 159 A. 633 (1932); Cassidy v. Welch, 319 Mass. 615, 67 N.E. (2d) 226 (1946).

The North Carolina Court, when confronted by a similar situation in the case of *Monger v. Lutterloh*[8] said:

> "It ought not be held that a landlord cannot, in any event enter and relet or use the abandoned premises without effecting a surrender of the lease as a matter of law; for in many cases to suffer the premises to remain vacant during the unexpired term would prove more costly and injurious to the owner than to lose his entire rent; and if the lessor is not permitted to enter and relet of use the property in any way without effecting a surrender of the lease, the tenant could, through his own wrong, force a termination by simply abandoning the premises."

The Connecticut Court in *McGrath v. Schallett*[9] warned against the application of this rule when it stated:

> "He [landlord] should not be penalized for attempting to mitigate damages, nor for attempting to keep his property from deteriorating."

This is clearly true in Wisconsin where, contrary to the great weight of authority,[10] the landlord is under a duty to mitigate damages.[11]

The problem of determining damages sustained in this type of case is perhaps one of the reasons the courts are so reluctant to charge the tenant with breach. That there are damages, in spite of the reoccupancy by the landlord, may be ascertained by merely asking why the landlord leased the premises in the first instance. The Wisconsin Court answered this question in *Selts Investment Co. v. Promotors of F. N. of W.*[12] There the Court said:

> "Real Estate is leased by a lessor because it yields a fund out of which he is enabled to pay taxes, repairs, insurance, etc., and because it is contemplated that it will furnish a reasonable return on investment."

The North Carolina Court applied a fair and workable rule in *Womble v. Leigh,*[13] where it held that if the lessor re-enters and uses the premises without effecting a surrender or termination of a lease, the measure of damages is the difference between the agreed rental and the fair rental value of the premises.

In determining the "fair rental value", consideration should be given to the type of premises in question; whether it have a seasonal rental value (as have the premises in the instant case), or a year around rental value, and to what use it was put and enjoyed by the landlord

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[8] 195 N.C. 274, 142 S.E. 12 at 15 (1928).
[9] McGrath v. Schallett, 144 Conn. 622, 159 A. 633 at 634 (1932).
[10] 40 A.L.R. 190.
[11] Selts Investment Co. v. Promoters of F. N. of W., 197 Wis. 471, 220 N.W. 222 (1929).
[12] *Ibid.*, p. 474.
[13] 195 N.C. 282, 142 S.E. 17 (1928).

after the breach. These considerations assume added importance in this jurisdiction because of the great number of lakeside vacation cottages, which, normally, have a rental value during the vacation season, and are virtually unrentable for the rest of the year, but are likely subjects for longer leases due to the present housing shortage.

Such considerations would help prevent the inequitable result of the instant case where the tenant occupied premises which had a rental value of $45.00 per week during the nine weeks of his occupancy, for which he had promised to pay $37.00 per month for a year, but actually paying only a total of $74.00. The landlord occupied the premises during the period when the property was unrentable.[14]

WILLIAM A. RITCHAY

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**Torts—Human Intervening Force as Breaking the Chain of Causation** — Plaintiff was driving an automobile on highway 12 in Minnesota and defendant Butler was riding with him as a passenger in the front seat. Defendant Knudsen in his car was directly behind plaintiff on the highway. Knudsen attempted to pass plaintiff and turned into the left lane, coming up approximately abreast of the plaintiff's car. A cattle truck was approaching from the other direction and the highway, having only two lanes, could not accommodate all three vehicles. In this perilous position, plaintiff, in order to save himself, turned to the right in order to get on the shoulder of the road. Defendant Butler, the passenger, grabbed the wheel and turned the automobile to the left causing it to go across the highway and into a ditch on the left side of the road where it rolled over. Plaintiff's automobile touched neither the truck nor Knudsen's car. Defendant Knudsen contended that the act of defendant Butler was an efficient intervening force relieving Knudsen of any liability. Plaintiff's contention was that the negligence of Knudsen set in motion a series of events which culminated in the accident and that the negligence of both defendants proximately contributed to the damages which he sustained. *Held:* That the act of defendant Butler in grabbing the steering wheel and forcing plaintiff's car to the left across the highway and into the ditch, when defendant Knudsen was attempting to pass plaintiff's automobile in the face of an oncoming truck, was an "efficient intervening cause" of the accident, so as to relieve defendant Knudsen from liability for plaintiff's injuries. *Robinson v. Butler et al., 33 N.W. (2d) 821 (Minnesota, 1948.)*

The Minnesota Supreme Court has stated in earlier cases[1] that in determining whether an alleged intervening cause is sufficient to relieve the original actor of responsibility the test is this:

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[14] See principal case, p. 104.

[1] Childs v. Standard Oil Co., 149 Minn. 166 at 170, 182 N.W. 1000 at 1001 (1921).